

The Catholic Lawyer

Volume 8
Number 3 *Volume 8, Summer 1962, Number 3*

Article 3

September 2016

The School Prayer Case - The Dilemma

William B. Ball

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Catholic Studies Commons](#), and the [First Amendment Commons](#)

Recommended Citation

William B. Ball (1962) "The School Prayer Case - The Dilemma," *The Catholic Lawyer*. Vol. 8 : No. 3 , Article 3.

Available at: <https://scholarship.law.stjohns.edu/tcl/vol8/iss3/3>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

THE SCHOOL PRAYER CASE:

Part I

DILEMMA OF DISESTABLISHMENT[†]

William B. Ball*

Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.

Justice Robert H. Jackson in *West Virginia State Bd. of Educ. v. Barnette* (1942).

NOTHING IS MORE SIGNIFICANT about the decision of *Engel v. Vitale*¹ than the substantial step it takes in constricting the free exercise of religion through an expansion of the concept of disestablishment. For it is obvious that there is such a thing as the use by a people of their public institutions and of public practices to express their most indigenous sentiments and aspirations, not merely as these pertain to the civil but indeed as they pertain to the sacral. This is not to affirm or to deny a right in the people of such collective free exercise but merely to describe the social fact which results from *Engel* and certain of its predecessor (but not precedent) decisions.

An interpretive process, which commenced with the *Everson*² decision in 1947 has now come almost full circle, and the uses made of the "no establishment" clause to sterilize the public schools of theistic

[†] The conclusion of this article will appear in the next issue of the CATHOLIC LAWYER.

* A.B., Western Reserve University; J.D., College of Law, University of Notre Dame. Former Professor of Law, School of Law, Villanova University. Presently, Executive Director and General Counsel, Pennsylvania Catholic Welfare Committee.

¹ — U.S. —, 30 U.S.L. WEEK 4550 (U.S. June 25, 1962).

² 330 U.S. 1 (1947).

religion now forshadow far wider uses to be attempted. But the end of the process may well be the casting out of favored orthodoxies of the disestablishers—a thing undreamt of when, fifteen years ago, a new translation of the first amendment came to be written.

That translation (in *Everson*) had proved startling to many a constitutional scholar.³ Historically, the term “establishment of religion,” as employed in the first amendment, had reference to the “establishment,” that is, the church.⁴ In 1947 the Supreme Court, in effect, translated “establishment” into “establishing,” thus laying the basis for constitutional attacks upon any governmental programs which in any way were promotive of religion itself.⁵ With the handing down, on June

25th, of the decision of the Supreme Court in the *Engel* case, we see a further explication of the principal concepts generated in *Everson*. This article is an attempt to describe and to assess this latest expansion in the concept of disestablishment.

The Reach of the Holding

The facts of the case involved a governmentally composed prayer,⁶ directed by the State of New York to be recited daily by public school pupils. But it would be incorrect to see the holding of the Court as limited to the fact of prayer-formulating by government, in spite of the many references made in the majority opinion to the facts of prayer-formulating. Certainly, the holding does not rest upon the fact of governmental composition. It can hardly be argued that the identification of the author is the controlling point in the Court's holding since, if this were so, the broad decisional basis which the Court announced would be inapposite and, indeed, a traditional Jewish, Catholic, Methodist, or Buddhist prayer or prayer peculiar to any other sect—and more obviously “sectarian” than the New York prayer—could then be an “official” school prayer to be considered to be not affected by the six majority Justices who gave us the *Engel* decision.

The point is not one of composing but of proposing. It is the fact of governmental offering, sponsorship or encouragement which is of the essence. But proposing of what? Prayers only? Apparently not. More things were wrought by this decision than prayer alone.

³ See, e.g., O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION (1949); Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 11 (1949); Sutherland, *Due Process and Disestablishment*, 62 HARV. L. REV. 1306 (1949).

⁴ Or, as Professor O'Neill has well noted, the first amendment did not prohibit a law about a religious “establishment” in the sense of a church-owned hospital or asylum but “a law about a monopolistic position of favor to one religious group. . . .” O'NEILL, CATHOLICISM AND AMERICAN FREEDOM 50 (1952).

⁵ “Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another.” *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947). Simultaneously, a popular myth, under the slogan of “separation of church and state,” has been constructed which imports the concept of an absolute separation of religion from public life. As stated in a paper delivered by the author at Amherst College, February 14th: “It is perhaps worth pointing out that those who have raised this slogan to the status of constitutional dogma have exceeded even the excesses of the constitutional literalists, because while the former demand an absolutely literal adherence to the words of the Constitution, the latter demand absolutely literal adherence to words which are nowhere to be found in the Constitution.”

⁶ “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.”

The Court did not strike down the prayer as unconstitutional, without more; it struck down the prayer as unconstitutional because it considered it to be a practice establishing religion in the public schools. The prayer program, the majority opinion tells us, was offensive because it constituted "a religious activity,"⁷ because "the nature of such a prayer has always been religious,"⁸ because it was "part of a governmental program to further religious beliefs,"⁹ because it "officially establishes the religious beliefs embodied in the Regents Prayer,"¹⁰ because it constituted "an establishment of religious services in public schools."¹¹ The basis for objection thus described, it is difficult to see that the holding does not reach a number of practices which have since been suggested as being unaffected by it — such as, for example, the Lord's Prayer, Bible reading,¹² prayers of their own offered aloud by teachers in the classroom, official periods for purposes of silent prayer, Christmas, Hanukkah or Easter celebrations. Certainly, the majority opinion lends no real basis for distinguishing prayers from other practices. And in the absence of a limitation clearly set forth in the opinion, one would be hard put to discover the logic of such a distinction.

Does the holding go outside the schools to reach *any* "governmental programs to

further religious beliefs"? Certainly, at many points the majority opinion states premises readily applicable to such programs. And it may be argued that the concurring opinion of Justice Douglas simply fills in the blank check drawn by the majority. Thus, in the eye of Justice Douglas, every sort of governmental program which is in any way promotive of religion¹³ is constitutionally offensive. In this he includes the prayer of the Marshall opening the sessions of the Supreme Court

¹³ But Justice Douglas' references are solely to theistic religious practices. The view is not novel in American history. Canon Stokes quotes the 1876 platform of the American Secular Union and Free Thought Federation, led by Robert G. Ingersoll, as follows:

To effect a total separation of Church and State, not only in name as it now is but as an actual fact. Taxation of church property, the elimination of all religious teaching in the public schools, and the abolition of all those clearly unconstitutional measures which are wrongly called Sunday Laws.

3 STOKES, CHURCH AND STATE IN THE UNITED STATES 594. The American Association for the Advancement of Atheism, in 1929, published the following demands:

The United States not being a Christian nation and its godless Constitution requiring a secular government, the American Association for the Advancement of Atheism demands:

- (1) Taxation of church property.
- (2) Elimination of chaplains and sectarian institutions from public payrolls.
- (3) Repeal of laws restricting the rights of Atheists and enforcing Christian morals.
- (4) Abolition of the oath in courts and at inaugurations.
- (5) Nonissuance of religious proclamations by chief executives.
- (6) Erasure of the superstitious inscription, "In God We Trust" from our coins and the removal of the church flag above the national flag on battleships.
- (7) Exclusion of the Bible as a sacred book from the public schools.

⁷ *Engel v. Vitale*, — U.S. —, 30 U.S.L. WEEK 4550 (U.S. June 25, 1962).

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Id.* at 4552.

¹¹ *Id.* at 4553.

¹² As a "religious exercise." See discussion *infra* at 191 as to what may be considered to be a religious exercise.

and prayers in the Congress. But he also indicates that the purchase of Christmas trees by communities with taxpayers' funds would be unconstitutional¹⁴ and broadly suggests that many other official endeavors also are: all forms of aid to activities — secular or otherwise — being carried out in church-related institutions, tax exemptions for religious organizations, the chaplaincies, the Pledge of Allegiance, "In God We Trust" and references to God in the Star-Spangled Banner. Respecting some of these, the majority opinion provides a rather obscure limitation apparently in favor of pomp and nationalism. Noting that "there are many manifestations in our public life of belief in God," Justice Black, in his footnote 21, pronounces his blessing upon these insofar as they are essentially "patriotic or ceremonial."¹⁵ Children, he says, may be "officially encouraged to express love for our country" (in spite of references to God in the traditional documents and anthems). Without explanation, he finds these to "bear no true resemblance

to the unquestioned religious exercise" with which the *Engel* case was concerned.

Broad though the decision is, there are nevertheless a few things in the field of Church-State relationships which neither its most horror-struck critic nor its most enthusiastic supporter can with any logic claim that it reaches. Perhaps of chief interest in this connection is the question of whether the decision reaches the further inclusion of education in church-related schools in any programs of aid¹⁶ which the federal government may subsequently enact. However, counsel for the victorious plaintiffs in *Engel* has made such a claim,¹⁷ and some lay opinion¹⁸ has developed, doubtless as a result. The claim, however, appears unsupportable. The facts of the case concerned religious exercises in public schools. But Justice Black, the author of the majority opinion, long ago rendered clear the distinction between governmental support of religion and governmental support of secular activities in so-called "religious" schools. It was in the *Everson* case that Justice Black, speaking for the majority, stated his oft-quoted declaration as to the meaning of the no establishment clause, and it was in this declaration that

(8) Suppression of the bootlegging of religion through dismissing pupils for religious instruction during school hours.

(9) Secularization of marriage, with divorce upon request.

(10) Repeal of anti-evolution, anti-birth control, and censorship laws.

Ibid.

¹⁴ The point is not precisely stated. Justice Douglas states: "A religion is not established in the usual sense merely by letting those who chose to do so say the prayer that the public school teacher leads. Yet once government finances a religious exercise it inserts a *divisive influence* into our communities." (Italics supplied.) It is at this point that, by a footnote, he refers to the purchase of Christmas trees. The reader is obviously not left entirely clear as to whether Justice Douglas thinks that a religiously "divisive influence" offends constitutionality even though it does not amount to any sort of "establishment."

¹⁵ *Engel v. Vitale*, — U.S. —, 30 U.S.L. WEEK 4550, 4554 (U.S. June 25, 1962). There is nothing in footnote 21 to encourage reading it as a broad exemption from the rule of the opinion.

¹⁶ It appears necessary, in the climate of 1962, to keep stressing the fact that the federal government has *already* enacted many such programs. See, for a summary of the point, *The Constitutionality of the Inclusion of Church-Related Schools in Federal Aid to Education*, 50 GEO. L.J. 399, 434-37 (1962).

¹⁷ Leo Pfeffer, Esq., as quoted in N.Y. Times, June 26, 1962.

¹⁸ Columnists Raymond J. Crowley, AP dispatch, June 27, 1962; David Lawrence, The Patriot (Harrisburg) June 29, 1962.

he stated that neither a state nor the federal government "can pass laws which aid one religion, aid all religions, or prefer one religion over another."¹⁹ Yet it was the precise holding of the *Everson* case that the providing by a state of reimbursement to parents out of public funds for transportation of their children to (*inter alia*) Catholic parochial schools by public buses was not violative of the no establishment clause. This decision carried forward the doctrine already established²⁰ that government may provide aid to secular activities in church-related institutions, completing its significance, however, against a background of extensive discussion of the meaning of disestablishment.

Nothing in the majority opinion in *Engel* gives ground to support the contention that it stands as precedent for a limitation upon the freedom of government to choose, among the objects of its support, secular activities being conducted in church-related institutions. Whether the concurring opinion of one Justice, Justice Douglas, stands for such a proposition is not clear. The Douglas opinion concludes that it is unconstitutional for government to "finance a religious exercise," regardless of the form which such financing takes.²¹ Then in a footnote the term, "*religious exercise*," is apparently made synonymous at least with such activities as education obtained in church-related schools under the G.I. Bill of Rights, nurse training received in denominational schools, the distribution of surplus food

under the National School Lunch Act, hospital construction under the Hospital Survey and Construction Act of 1946, and the use of "In God We Trust" on currency.²²

It will come as a surprise to many to learn that the nature of the *institution sponsoring* the activity converts the activity into a "religious exercise" even though the activity may consist of a course in Alternating Current Machinery II or Fundamentals of Life Insurance and Annuities.²³ This, however, is the view solely of Justice Douglas as expressed in *Engel* and not the view of the majority. Not without logic, considering his premises, Justice Douglas, in *Engel*, discovers that he must now declare the *Everson* case (in which he voted for school buses for parochial children) "in retrospect to be out of line with the First Amendment,"²⁴ and he thus creates for Justice Rutledge in that case a posthumous majority. But one is hard put to see why he did not, in overruling the Justice Douglas of *Everson*, likewise, in express fashion, overrule the Justice Douglas who spoke for the majority of the Court in *Zorach v. Clauson*.²⁵ While an element of mystery in opinion-writing is always intriguing, this instance rises to the dramatic. For indeed much of "the common sense of the matter" (to borrow the phrase of Justice Douglas in *Zorach*) concerning contemporary Church-State problems had been stated as the majority opinion in the *Zorach* case: (1) that the first amendment "does not say that in every and all respects there shall be a separation of Church and

¹⁹ *Everson v. Board of Educ.*, 330 U.S. 1, 15, 16 (1947).

²⁰ *Cochran v. Board of Educ.*, 281 U.S. 370 (1930); *Bradfield v. Roberts*, 175 U.S. 291 (1899).

²¹ *Engel v. Vitale*, — U.S. —, 30 U.S.L. WEEK 4550, 4554 (U.S. June 25, 1962).

²² *Ibid.*

²³ From VILLANOVA UNIVERSITY GENERAL CATALOGUE 42, 45 (1959-60).

²⁴ *Engel v. Vitale*, — U.S. —, 30 U.S.L. WEEK 4550, 4554 (U.S. June 25, 1962).

²⁵ 343 U.S. 306 (1952).

State";²⁶ (2) that otherwise, "the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly";²⁷ (3) that otherwise churches could not be required to pay property taxes, and all "references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the first amendment";²⁸ (4) that "when the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions";²⁹ (5) that such encouragement and cooperation follows the best of our traditions because "then it respects the religious nature of our people and accommodates the public service to their spiritual needs";³⁰ (6) to hold that government may not show such respect or make such accommodation would be "to find in the Constitution a requirement that the government show a callous indifference to religious groups"; (7) that this would also "be preferring those who believe in no religion over those who do believe";³¹ (8) that "we are a religious people whose institutions presuppose a Supreme Being."³²

Only the last-mentioned point receives comment in the Douglas concurrence in *Engel*,³³ with the added remark that under our Bill of Rights "free play is given for making religion an active force in our lives"³⁴ and a footnote somewhat unac-

countably appended which tells us that (as shown by the Northwest Ordinance) "religion was once deemed to be a function of the public school system."³⁵ The Douglas concurrence—had it decisional force—would state a wholly new doctrine of disestablishment, one requiring an absolute separation of Church and State, one to which all of the views expressed in *Zorach* respecting encouragement, cooperation, accommodation, specific ways of "concert or union or dependency" would be inapplicable. It would be difficult indeed not to ascribe the result as a triumph for the "fastidious atheist or agnostic"³⁶ whom Douglas characterizes in *Zorach* as the logical objectant to the supplication with which the Supreme Court opens each session.

A Question of Authority

If trouble with judicial precedents is encountered in the Douglas opinion, none can be encountered in the majority opinion. No judicial precedents are cited. No attempt is made to link up its social and philosophic assertions with anything which the Court ever decided in the past. This is surprising, especially in view of the fact that concepts of disestablishment and free exercise—indeed in relation to the schools—had been worked over by the Court and by Justice Black in prior cases.³⁷ But no relationships to concepts expressed in *McCullum*,³⁸ *Everson* or *Zorach* are estab-

²⁶ *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

²⁷ *Ibid.*

²⁸ *Id.* at 312, 313.

²⁹ *Id.* at 314.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Id.* at 313.

³³ *Engel v. Vitale*, — U.S. —, 30 U.S.L. WEEK 4550, 4556 (U.S. June 25, 1962).

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

³⁷ *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948); *Zorach v. Clauson*, 343 U.S. 306 (1952).

³⁸ Justice Douglas in *Engel* states: "*McCullum v. Board of Education* . . . does not decide this case." *Engel v. Vitale*, — U.S. —, 30 U.S.L. WEEK 4550, 4555 (U.S. June 25, 1962).

lished, and just as there has already been speculation as to whether the Court, in view of the storm of protest over *Engel*, may make a retreat similar to the retreat it made from *McCullum* to *Zorach*, so will it likewise doubtless be argued that the Court has now retraced its steps from the spirit of *Zorach* back to the letter of *McCullum*. But whatever one may say of the absence of judicial precedent, the presence in the opinion of nonjudicial precedent poses even greater difficulties. Justice Black's supporting footnotes represent a guided tour through selected areas of history—with an astounding result: we are led to the conclusion that were the Founding Fathers of the United States alive today, they would have supported the ousting of the Regents Prayer from the New York schools.

This is more of that singular view of history already dominant in *Everson* and *McCullum* whereby religion (*theistic* religion, that is) appears in a wholly negative role, as a perpetual disturber of the peace, and a thing to be kept severely quarantined to the dark recesses of the most private. Here, religion—*theistic* religion, that is—as representing a vital force and an immensely important tradition in American life—including American public affairs—is unrecognized.³⁹ This view of history is constructed, however, upon disturbingly sparse materials,⁴⁰ none of which may be

³⁹ However, the dissenting opinion of Justice Stewart emphatically supplies such recognition. *Engel v. Vitale*, — U.S. —, 30 U.S.L. WEEK 4550, 4555 (U.S. June 25, 1962).

⁴⁰ Chiefly COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* (1902), FISKE, *THE CRITICAL PERIOD IN AMERICAN HISTORY* (1899), and Madison's *Memorial and Remonstrance Against Religious Assessments*, 2 WRITINGS OF MADISON 183.

properly regarded as connected with the drafting of the first amendment.⁴¹ The closest connection which the Court attempts is quotation from Madison's *Memorial and Remonstrance against Religious Assessments*, which antedated by four years the deliberations which resulted in the final draft of the first amendment. Indeed the sole historical reference in point to be found in the opinions of the six Justices who voted down the Regents Prayer appears in footnote 9 of the concurrence of Justice Douglas wherein he states: "*Religion was once deemed to be a function of the public school system*," citing the Northwest Ordinance (*italics supplied*). The Northwest Ordinance, of course, directly linked religion with the schools.⁴² It antedated, as Justice Douglas notes, the first amendment but, as he fails to note, was re-enacted by the First Congress at the very height of the deliberations over the wording of the religion clauses of the first amendment, which wording, as we now have it, was finally approved by that Congress September 25, 1789.⁴³ Indeed the Southwest Ordinance, containing the same article relating to religion in education, was passed by the same Congress in 1790.

So it must with reluctance be concluded that the authority upon which the majority

⁴¹ As Justice Stewart, dissenting, stated: "What is relevant to the issue here is not the history of an established church in sixteenth-century England or in eighteenth-century America, but the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government." *Engel v. Vitale*, — U.S. —, 30 U.S.L. WEEK 4550, 4557 (U.S. June 25, 1962).

⁴² "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged."

⁴³ *Annals of Congress*, Vol. I, pp. 913 and 88.

opinion rests is solely Justice Black. This becomes an especially troublesome aspect of the case, considering, as we shall,⁴⁴ that the judgment of the Court may be deemed theological in nature.

Judicial Review: Suing to Stand?

Not the least intriguing aspect of the *Engel* case is the question of standing to sue. The issue of standing was not raised in the case. Broad statements appearing in the majority opinion, however, raise a serious question as to whether the requirements of standing have not now undergone serious modification. The Court in its opinion had nothing to say upon the subject of any injury encountered by the plaintiffs, going no farther than hinting at the possibility of some sort of coercion—at most, “indirect”—discussing the supposed effects of the prayer upon the life of society in general. Justice Douglas said he discovered no element of proselytizing in the New York practice, nor indoctrination or exposition. Apparently his own *Weltanschauung* led him to observe that “if government interferes in matters spiritual, it will be a divisive force,”⁴⁵ and he evidently thought it the business of the judiciary to stop “divisive” practices by government. But as to the *plaintiffs*, he found “no element of compulsion or coercion in New York’s regulation.”

Should the plaintiff parents have been considered to have standing to sue? Viewed in the light of prior Supreme Court decisions in religion cases, this is not clear.⁴⁶

⁴⁴ See discussion *infra* at 195.

⁴⁵ *Engel v. Vitale*, — U.S. —, 30 U.S.L. WEEK 4550, 4556 (U.S. June 25, 1962).

⁴⁶ See generally O’Toole, *Quis Custodiet: Disestablishment and Standing to Sue*, 7 CATHOLIC LAWYER 203 (1961).

In *Doremus v. Board of Educ.*,⁴⁷ the plaintiffs sought a declaratory judgment that a New Jersey statute requiring reading, without comment, of five verses of the Old Testament each day in the public schools violated the no establishment clause of the federal constitution. One of the two plaintiffs was the parent of a child who attended a school in which the Bible reading practice took place. This child had graduated from the public schools before the appeal in that case was taken to the Supreme Court. The Supreme Court held the parent to have no standing. Speaking of the child and the program, Justice Jackson, for the majority noted:

There is no assertion that she was injured or even offended thereby or that she was compelled to accept, approve or confess agreement with any dogma or creed or even to listen when the Scriptures were read. On the contrary, there was a pretrial stipulation that any student . . . could be excused during Bible reading and that in this case no such excuse was asked.⁴⁸

Referring to the fact that she had already graduated at the time of the appeal, the Court concluded that “no decision we could render now would protect any rights she once may have had. . . .”⁴⁹

The implication from the first quotation is that a showing of injury, or of compulsion to accept a creed, would be necessary to standing. This is, of course, in accordance with traditional doctrine of judicial review.⁵⁰ The implication from the second

⁴⁷ 342 U.S. 429 (1951).

⁴⁸ *Doremus v. Board of Educ.*, 342 U.S. 429, 432 (1951).

⁴⁹ *Id.* at 433.

⁵⁰ “The Court will not pass upon the validity of a statute upon the complaint of one who fails to show that he is injured by its operation.” Brandeis, J., concurring in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

quotation reinforces the point of the first: the standing of the parent to sue derives from an asserted violation of a legal right in the child or injury to him. But what is the nature of that right? In the few cases which have dealt with the no establishment clause of the first amendment, little guidance is to be found. So far as *McColum* is concerned, it has been suggested that the humiliation caused to the child by being set apart in a released time program might have constituted the injury, or violation of right, which created his parent's standing. But Justice Black, who spoke for the majority, gave no reason. Justice Jackson doubted that the asserted "humiliation" provided the Court any jurisdictional basis:

The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground.⁵¹

In the subsequent *Zorach* case, the Court touched only in the briefest fashion upon the question of standing, stating merely that no problem of standing was here posed since, unlike the parent in *Doremus*, the parents in *Zorach* had their children currently in the schools in question.

In the *Doremus*, *McColum* and *Zorach* cases, the question of standing of a plaintiff as taxpayer was also posed. In *Doremus* the Court denied the taxpayer's standing

both on the ground that state moneys were involved⁵² and on the ground that the grievance was "not a direct dollars-and-cents injury but . . . a religious difference."⁵³ In *McColum*, the Court, as noted, gave no reason for supporting the plaintiff's standing. Local moneys, rather than state moneys, it should be noted, were involved. Justice Jackson, in his concurrence, stated that no basis for jurisdiction could rest, in the case, upon the plaintiff's status as taxpayer, because the cost of operating the religion program involved was "neither substantial nor measurable."⁵⁴ The *Zorach* opinion made no reference to the fact that the plaintiffs might have had standing as taxpayers. It is to be noted that state, not local, moneys were involved in that case and that the cost of the program could scarcely have been more "substantial or measurable" than the cost of the Illinois program.

In *Engel v. Vitale* the Court says that the no establishment clause is violated by the fact of an enactment which establishes an official religion. It says that the free exercise clause is not violated by the fact of any enactment but only by governmental action which coerces people:

Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those

⁵¹ *Illinois ex rel. McColum v. Board of Educ.*, 333 U.S. 203, 233 (1947).

⁵² The Court cited *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

⁵³ *Doremus v. Board of Educ.*, 342 U.S. 429, 434 (1951).

⁵⁴ *Illinois ex rel. McColum v. Board of Educ.*, *supra* note 51, at 234.

laws operate directly to coerce nonobserv-ing individuals or not.⁵⁵

In terms of standing to sue, did not the Court thereby say, in effect, that its juris-diction could be invoked by the mere fact of the filing of a complaint that a statute exists which is asserted to breach the no establishment clause? Evidently coercion need not be shown. Under this doctrine, what is the character of the parties com-plainant? They are not persons having standing to sue but persons who have standing because suing.⁵⁶ This doctrine of suing to stand will obviously raise other questions due to its relationship to the "case or controversy" requirement⁵⁷ and the related policy of refusal of advisory opinions.⁵⁸ It may indeed be asked whether, in the field of no establishment cases, the doctrine has now been cast aside that one who attacks a statute as unconstitutional must show that as applied to him the statute is invalid.⁵⁹ There are the strongest in-ferences in the majority opinion that one need but assert that some sort of "estab-lishment" activity affects mankind, and the presumed injury to *society* gives one stand-ing to sue.⁶⁰ Of extraordinary significance

is the apparent special withdrawal of the no establishment clause from ordinary prin-ciples of judicial review — a withdrawal which can only lead to a proliferation of litigation concerning religion. This appears a reflection, in terms of judicial review, of the evident preoccupation of the Court with religion (*theistic* religion, that is) as a divisive and disturbing force in society and one to be kept in severest quarantine.

The Heart of the Matter: What is "Religion"?

The Regents Prayer was struck down by the Court as a religious exercise. The Court has long since discarded the tradi-tional meaning of an "establishment of religion." While once the term was under-stood to mean a church or sect,⁶¹ the Court in 1947 decided that it should mean not only a religion but religion itself.⁶² The term, "religion," had long been thought to refer to *theistic*⁶³ religion. The Court, in *Davis v. Beason* defined "religion" as fol-lows:

The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedi-ence to his will.⁶⁴

⁵⁵ *Engel v. Vitale*, — U.S. —, 30 U.S.L. WEEK 4550, 4552 (U.S. June 25, 1962).

⁵⁶ "Apparently the sole purpose and the only function of plaintiffs is that they shall assume the role of actors so that there may be a suit which will invoke a court ruling upon the con-stitutionality of the statute." *Doremus v. Board of Educ.*, 5 N.J. 435, 439, 75 A.2d 880 (1950).

⁵⁷ U.S. CONST. art. III, § 2.

⁵⁸ *Muskrat v. United States*, 219 U.S. 346 (1911).

⁵⁹ See *Tileston v. Ullman*, 318 U.S. 44 (1943).

⁶⁰ Justice Douglas, in his concurrence, even hints that "*establishment*" activity need not be shown but that a "divisive influence" arising from gov-ernment financing of religious exercises may suf-fice to give standing. *Engel v. Vitale*, — U.S. —, 30 U.S.L. WEEK 4550, 4556 (U.S. June 25, 1962).

⁶¹ Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 11, 12 (1949).

⁶² *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

⁶³ Madison, referring not to establishment but to religion, described religion as "the duty which we owe to our Creator and the Manner of our discharging it." *Memorial and Remonstrance Against Religious Assessments*, 2 WRITINGS OF MADISON 183. Jefferson, similarly, spoke of religion as "a matter which lies solely between man and his God." Letter to Danbury Baptist Association, 8 JEFF. WORKS 113.

⁶⁴ 133 U.S. 333, 342 (1889).

Such has been the traditional and accepted view. However, in 1961, in *Torcaso v. Watkins*,⁶⁵ the Supreme Court announced a new definition of the term. The case involved an appointee to the office of notary public in Maryland who was refused a commission to serve because he would not declare his belief in God and was therefore barred from the office by virtue of a provision of the Maryland Constitution requiring such oath as a qualification for office. The plaintiff appointee claimed that this provision violated his rights of freedom of belief under the first amendment. The Supreme Court upheld the plaintiff's contention, not rendering it clear, however, whether it intended to say that his "freedom of belief" was specifically protected by the free exercise clause, the no establishment clause, or both.⁶⁶ Stating, however, that neither a state nor the federal government can "aid those religions based on a belief in God *as against those religions founded on different beliefs*,"⁶⁷ the Court, in footnote 11, amplified its definition of religions founded on "different beliefs":

Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.⁶⁸

⁶⁵ 367 U.S. 488 (1961).

⁶⁶ The Court appears to have relied chiefly upon the latter clause, due to the emphasis it placed upon quotation from the *Everson* case. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

⁶⁷ *Id.* at 495. (Italics supplied.) A federal district court is reported as having ruled that Black Muslimism is a religion within the meaning of the first amendment. The doctrinal core of this group appears to be racial, with the preachment of Negro supremacy. See N.C.W.C. News Service July 3, 1962.

⁶⁸ *Ibid.* The Human Rights Commission of the

The Court cited, *inter alia*, the case of *Washington Ethical Soc'y v. District of Columbia*,⁶⁹ wherein it was ruled that a statute granting a tax exemption to "religious societies" must be construed to include Ethical Culture though this was not a religion requiring "a belief and teaching of a Supreme Being who controls the universe."

There are, of course, various senses in which "religion" (whether theistic or non-theistic) may be taken: (a) as a cult, sect, church or establishment, an organization of adherents, (b) as worship—e.g., prayer, (c) as a part of culture, (d) as precept, a body of truths or doctrines expressing an oughtness, world outlook, way of life.

As has been noted, the Court, since *Everson*, has not limited the term "religion" as used in the first amendment to

United Nations has had under study the question of defining religion. The *Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities* in 1960 proposed that in view of the difficulty of defining "religion," the term "religion or belief" be substituted and that this should be understood to include, "in addition to various theistic creeds, such as other beliefs as agnosticism, free thought, atheism and rationalism." Krishna-swami, *Study of Discrimination in the Matter of Religious Rights and Practices* 1. Parallels to the Court's naming of Ethical Culture and Secular Humanism as religions, will be noted in the *Special Rapporteur's* further comment that "great religions and beliefs are based upon ethical tenets such as the duty to widen the bounds of good-neighborliness and the obligation to meet human need in the broadest sense." *Ibid.* See also Barrett, *United Nations and Religious Liberty*, SOCIAL ORDER 265 (June 1961). The Commission's deliberations in 1962 have been concerned with the same problem. An N.C.W.C. News Service dispatch dated March 19, 1962 reported that the Polish representatives insisted that the term "religion or belief" include "rationalist convictions, including atheism."

⁶⁹ 249 F.2d 127 (1960).

mean a cult, sect or church. As has also been noted, the Court, in *Engel*, considered worship in the schools by means of prayer to be "religion" within the first amendment's meaning. As to the third possible meaning of the term, namely, as an element of culture, the Court has not yet had occasion to rule, and the matter of ruling (given the extreme uses to which the first amendment is today being put) may not prove easy.⁷⁰

The fourth meaning of the term is undeniably the most significant in the light of the concerns which the Court has expressed with respect to the supposed evil effects of even the slightest, briefest, most "neutral," noncompulsory reminder of God in the classroom. Although the Court, in *Engel*, stated that the mere prescription of the Regents Prayer program violated the no establishment clause, it did not hesitate to make clear what it considered to be the essential mischief in the program. This was the establishing of beliefs.⁷¹ Recalling, however, that nontheistic religion now qualifies as "religion" within the meaning of the first amendment, it is also clear that such nontheistic religion is embraced in the

preceptive sense by the clauses of the first amendment. The preceptive aspect of "religion," as used therein, was recognized long ago by the Court.⁷² It received explicit recognition in *Torcaso*. The Ethical Culture Movement, recognized as a religion therein, is described as follows:

A national movement of Ethical (Culture) societies—religious and educational fellowships based on ethics, believing in the worth, dignity and fine potentialities of the individual, encouraging freedom of thought, committed to the democratic ideal and method, issuing in social action.⁷³

Secular Humanism, also denominated a religion by the Court in *Torcaso*, is a religion even more markedly preceptive.

In view of the Court's conferral upon "Ethical Culture, Secular Humanism and others"⁷⁴ of the constitutional status of "religion," it is moreover plain that these become all but indistinguishable from any other expressions of ideological orthodoxy. Previous to the *Torcaso* decision, the Supreme Court had essayed a distinction between a public school education which was ideologically "neutral" and one which was ideologically partisan. For example, in the *Barnette* case the Court stated:

Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any *class, creed, party, or faction*.⁷⁵

The words italicized provided a general description of areas which were out of bounds for partisan comment or value-inculcation. The concept was further stressed

⁷⁰ May a History of Methodism be taught under public auspices? Suppose that as the instructor understands history, he comes to admire Wesley and Methodism, and that his teaching reflects this? May he be required to teach the course from the point of view of an antagonist to Methodism? But if he does not, then may he not be teaching as much "of" Methodism as "about" Methodism? Or, is the History of Methodism—however taught (and finding the "true" in history is often impossible)—simply a part of the domain of *secular* knowledge? Cf., LaNoue, *The National Defense Education Act and "Secular" Subjects*, PHI DELTA KAPPAN (June 1962). Such are the Absurdities into which we are led by the doctrine of *absolute* separation of religion from matters public.

⁷¹ See footnotes 8 through 11 *supra*.

⁷² *Davis v. Beeson*, 133 U.S. 333, 342 (1889).

⁷³ 1961 YEARBOOK OF AMERICAN CHURCHES 47 (1961).

⁷⁴ *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

⁷⁵ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1942). (Italics supplied.)

in the now famous passage from the same opinion:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.⁷⁶

This simplification of matters accounted for everything except the realities of the educational process. Education, "the very foundation of good citizenship,"⁷⁷ is as much a value-acquiring experience as it is an information-acquiring experience, and indeed that which appears as information-giving is often in fact value-inculcation.⁷⁸ The educational process, so far as it pertains to the young, at least, must inevitably concern moral judgments, concepts of what is "good" (even though this may be expressed as what is "useful"), value-expressions respecting conduct, history, public figures and movements, nation and possibly such matters today as intergroup relationships, the meaning of democracy, communism, neutralism.

This leads to two questions: *First*, are there establishments of nontheistic religions or practices imposing ideological disciplines or orthodoxies in the public schools today? *Second*, what is the effect

upon these of *Engel v. Vitale*?

It cannot be doubted that nontheistic religions are widely established in public schools in the United States.⁷⁹ Doctrines of Secular Humanism, for example, are officially inculcated precisely in those areas of the educational process which most closely relate to life, its meaning, how it shall be conducted, and man's relationship to man and the universe. It is neither to decry nor to scorn these efforts to state the fact that they exist. It should not occasion surprise that they should exist because, by means of one "religion" or another, society, through its schools, will inevitably seek to direct the young in the business of living, especially with respect to the foregoing essential matters. It is all very well to assert that "the state may not reach for a man's soul"⁸⁰ and to assume that because no *theistic* religion or "orthodoxy" is permitted in the school, that therefore the school is "neutral" and has tidily left concerns for the soul to the individual, to parents or the home.

A typical example of the inculcation of nontheistic religious doctrines in the public schools is found in the Commonwealth of Pennsylvania's recently published *Guide to Intergroup Education in Schools*.⁸¹ It is officially described as "initiating a program relating to the central core of our free democratic society."⁸² Its effect is intended

⁷⁶ *Id.* at 642.

⁷⁷ "It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1953).

⁷⁸ For excellent general commentary, see BLUM, *FREEDOM OF CHOICE IN EDUCATION*, especially Chapter 5 thereof, *Freedom to Choose a God-Centered Education*.

⁷⁹ It is to be hoped that the most detailed survey of the extent of permeation of such religion in public school curricula and teaching soon will be undertaken.

⁸⁰ The phrase is that of Dr. Theodore Powell. See his paper, *Religion and Education*, presented before a meeting of The National Conference of Christians and Jews, New York, May 9-10, 1962.

⁸¹ COMMONWEALTH OF PENNSYLVANIA, *Our Greatest Challenge—Human Relations* (1962).

⁸² *Id.* at 1.

to be, not compartmentalized, but pervasive:

It involves every aspect of the school program . . . intergroup education must be a part of the study of every subject; it must be part of the fiber of every teacher.⁸³

And it is indicated that there can be no ideally perfect education which is not intergroup. ("No Guide is more important to building a strong democracy from within our society").⁸⁴ Beliefs are officially promoted at the outset:

Is not the fundamental base of democracy the belief in the dignity and worth of each individual and equal opportunity for each to develop his maximum potential?⁸⁵

The *Guide* aims at the molding of the pupil's attitudes, beliefs, and behavior.⁸⁶ Specific orthodoxies are to be inculcated. For example, among the student attitudes to be developed is:

Respect for the rights of each citizen to equal protection under the law and equal opportunity to secure education, employment, housing, and the use of public accommodations, *as basic to democracy*.⁸⁷

It is to be noted that respect for the rights listed is supplied a philosophic basis, and that the basis selected ("as basic to *democracy*") is Secular Humanist rather than, say Christian Humanist (*e.g.*, "as basic to human beings created by God"). A strong note of partisanship for the philosophy of environmental determinism is apparent as seen in the following attitude to be inculcated:

Realization that differences in attitudes and

behavior are determined largely by one's cultural environment. . . .⁸⁸

The text outlines a very extensive governmental program for the resolution of admittedly critical problems in human relations, but according to selected philosophic principles which necessarily exclude other philosophic principles.⁸⁹

It may now be asked what the effect of *Engel v. Vitale* is upon establishments of nontheistic religions and officially introduced nontheistic orthodoxies. The force of the decision is such as necessarily to exclude these, too, from the public schools. This conclusion is based as thoroughly in justice as it is in what the Supreme Court has defined "religion" to be. If it be deemed that the same Court which has inveighed against all ideological orthodoxies in the public schools, and which has stated that Secular Humanism and Ethical Culture are religions, has limited the premises of *Engel* to *theistic* religions, then this is to say that the Court in *Engel* has rendered a *theological* judgment. And the implications of such a judgment are enormous. These implications go far beyond questions of abuse of judicial power; they relate to freedom of religion in its fullest and most essential sense.

Assuming, however, that the decision of the Court is not to be read as a theological

⁸⁸ *Id.* at 9.

⁸⁹ Philosophic principle is expressed in the "neutral" general curriculum. "It is a fallacy to suppose that by omitting a subject you teach nothing about it. On the contrary you teach that it is to be omitted, and that it is therefore a matter of secondary importance. And you teach this not openly and explicitly, which would invite criticism; you simply take it for granted and thereby insinuate it silently, insidiously, and all but irresistibly. . . ." MOBERLY, *THE CRISIS IN A UNIVERSITY*, as quoted in BLUM, *FREEDOM OF CHOICE IN EDUCATION* 98.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Id.* at 7.

⁸⁷ *Ibid.* (Italics supplied.)

judgment, then Secular Humanist programs in the public schools must bear the full brunt of the teachings of *Engel*, *McCollum* and *Everson*, with the myriad implications which this must involve. If Ethical Culture and Secular Humanism are to enjoy the benefits of free exercise (because they are religions) they cannot avoid the rigors of disestablishment. There is no possibility, under the Constitution, for giving preference to nontheistic religions over theistic religions,⁹⁰ and the thought would be intolerable, that the Court should ever call nontheistic religions "religions" in terms of protection for these, but consider them non-religions in terms of impositions by them. Under that reading of the *Engel* case, it is fully expectable that the public schools will become centers of contention respecting fact and content of all manner of curricular offerings relating to ethics, social outlook, democratic living, inter-

group relations and various other presently protected sanctuaries of presently preached orthodoxies.

This latter reading is, unhappily, the best face that can be put upon the *Engel* decision. For it will now be recognized that if it is an unlawful injection of religion into a public school to teach that the brotherhood of man rests upon the Fatherhood of God, so must it be to teach that the brotherhood of man rests upon "democratic needs" or that it does not rest upon the Fatherhood of God. Dogma is dogma. Value-teaching is value-teaching. Religion is religion. Orthodoxies are orthodoxies.

The Court has thus brought American public school education to a dilemma and the correctness of Justice Jackson's remark quoted at the beginning of this article is manifest. The Court has expressed concern for the divisiveness alleged to be caused by an almost universally desired reminder of God in the public schools. But its action will likely presage that "deeper division" of which Justice Jackson speaks.

(To be Continued)

⁹⁰ "Neither [a state nor the federal government] can pass laws which . . . prefer one religion over another." *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).